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FILED
FEB 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(18) (16)
Nos. 06-340 and 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*
Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*
Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amicus will address the following questions:

1. Whether the Environmental Protection Agency ("EPA") "authorizes" and is the legal cause of effects of private land use activities, within the meaning of § 7(a)(2) of the Endangered Species Act ("ESA") where § 402(b) of the Clean Water Act ("CWA") does not allow EPA to consider effects on ESA-listed species in transferring CWA permitting authority to a State, and where the direct cause of such effects is a private land use initiative which requires some State-issued permit.

2. Whether the panel below improperly mandated a construction of ESA § 7(a)(2) where that construction is not the only permissible interpretation of the ESA, is contrary to the agencies' interpretation of a statute and rules they administer, and is not compelled by *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

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INTERESTS OF *AMICUS CURIAE*

Amicus curiae American Farm Bureau Federation ("AFBF")[1] is a voluntary general farm organization. AFBF represents more than five million member families through member organizations in all 50 States and Puerto Rico.

The Ninth Circuit found that § 7(a)(2) of the Endangered Species Act ("ESA")[2] overrides the mandate of Clean Water Act ("CWA") § 402(b), 33 U.S.C. 1342(b), to "approve" a State's proposed National Pollutant Discharge Elimination System ("NPDES") permitting program if nine specified criteria are satisfied. *Defenders of Wildlife v. U.S. Envtl. Prot. Agency*, 420 F.3d 946 (9th Cir. 2005), *reh'g denied*, 450 F.3d 394 (9th Cir. 2006) ("*Defenders*") (Fed. Pet. App. 1a-67a, 68a-92a). Because State program approval has the effect of transferring NPDES permitting authority from EPA to the State, under the ruling below, EPA now must either continue to issue federal permits for CWA discharges in Arizona or find ways to ensure that Arizona "voluntarily" will meet EPA's asserted § 7(a)(2) duties. *Id.* at 977 (Fed. App.59a-60a).

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than AFBF, its members, and its counsel made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief. All parties other than the United States submitted letters to the Court consenting to the filing of all *amicus curiae* briefs. The consent of the United States has been filed with the clerk.

[2] ESA § 7(a)(2) provides: "Each Federal agency shall, in consultation with and with the assistance of the Secretary [who acts through the U.S. Fish and Wildlife Service or National Marine Fisheries Service (the "Service")] insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species ["listed species"] or result in the destruction or adverse modification of designated critical habitat." 16 U.S.C. 1536(a)(2).

AFBF members are directly affected by the questions presented here. AFBF's membership includes operators of all species of livestock farms subject to NPDES regulation as "concentrated animal feeding operations." *See* 33 U.S.C. 1362(14); 40 C.F.R. 122.23. These members would face increased procedural and substantive regulatory burdens under the Ninth Circuit's view that ESA § 7(a)(2) overrides the directives of the CWA.

More generally, the Ninth Circuit's reasoning "would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* agency." *Defenders*, 450 F.3d at 398-99 and n.4, 401 (Kozinski, J., dissenting from denial of rehearing) (Fed. App. 69a, 74a-79a, 82a). Acceptance of the Ninth Circuit's logic thus would undermine the ability of federal agencies to promptly issue any number of permits, loans, insurance, or other government services under the standards specified in the organic law for each program. Many AFBF members rely on such federal programs or services. Hence, they have substantial interests in the reversal of the decision below.

SUMMARY OF ARGUMENT

The split panel opinion in *Defenders* found that ESA § 7(a)(2) overrides the explicit commands of other statutes. Here, § 7(a)(2) was read to negate CWA § 402(b)'s directive that EPA "shall approve" a State's NPDES permitting program if nine exclusive criteria are satisfied. This aspect of the opinion is incorrect for many reasons.

First, in this setting, no "action authorized, funded, or carried out by" EPA proximately causes impacts to listed species that might trigger ESA § 7 duties. Rather, any such impacts would be caused by private land use activities regulated by the State of Arizona. To the extent that EPA's "approval" of a State's NPDES permitting program would have a "but for" causal relationship to subsequent species impacts, the *legally relevant* cause nevertheless is the action of Congress. Congress limited EPA's discretion and directed in CWA § 402(b) that EPA "shall approve" State programs that meet specified requirements.

Second, the implementing agencies have concluded that § 7 applies only if the federal action agency has discretionary authority under its organic laws to modify its action based on wildlife concerns. Courts owe *Chevron* deference to the agencies' interpretation of ESA § 7 and *Auer* deference to the agencies' interpretation of rules like 50 C.F.R. 402.03. That deference is determinative here because the agencies' interpretation of ESA § 7 is permissible. For example, as ESA § 2(c) and § 7 as originally adopted only instruct federal agencies to "utilize their authorities" to protect listed species, the agencies can permissibly conclude that ESA § 7(a)(2) does not require action in *contravention* of the directives of an agency's organic laws. As in another ESA decision, a conclusion that "the Secretary's interpretation is reasonable suffice[s] to decide this case." *Babbitt v. Sweet*

Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687, 703 (1995).

Third, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), does not bar the agencies' interpretation of ESA § 7. As the existence of an ESA § 7 violation was conceded in that case, the Court's opinion did not express a holding on § 7. The *dicta* in *TVA v. Hill* concerned distinct issues and did not address what the law would be if TVA were acting under a statutory obligation to close the dam gates. Further, *TVA v. Hill* includes favorable *dicta* that ESA § 7 describes the "obligation of [federal] agencies to *take steps within their power* to carry out ESA objectives. 437 U.S. at 182-84 (emphasis added). Since ESA § 7 allows the agencies' interpretation, even if *dicta* in *TVA v. Hill* provides some support for the Ninth Circuit's conclusion, the agencies' view should be upheld. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-82 (2005).

ARGUMENT

I. ESA § 7(a)(2) Operates Within a Federal Agency's Range of Discretion Under Its Organic Laws

The principal question presented is whether ESA § 7(a)(2) overrides the directives and limitations of other federal statutes. The view of the United States and the agencies implementing § 7, as codified at 50 C.F.R. 402.03 and 402.16, is that ESA § 7(a)(2) operates only to the extent that a federal agency has discretion to act in favor of listed species under its organic laws. The view adopted by the court below is that ESA § 7(a)(2) constrains, and provides new authority governing, every federal agency action – even in contravention of those laws.

Many statutes direct federal agencies to issue permits, grants, insurance, or other benefits if a prescribed set of

standards is satisfied. Under the panel majority's ruling, ESA § 7(a)(2) *bars such action*: (1) procedurally, until the federal agency completes "consultation" with the relevant Service (here, the U.S. Fish and Wildlife Service ("FWS")); and (2) substantively, unless the agency can "insure" that the action Congress directed in another statute is not likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. *Defenders*, 420 F.3d at 961-69 (Fed. App. 26a-44a). That view "transformed the ESA into an overriding mandate that trumps an agency's obligations under its own governing statute." *Defenders*, 450 F.3d at 398 (Fed. App. 74a) (Judge Kozinski, dissenting from denial of rehearing).

Here, it was uncontested that Arizona satisfied the nine exclusive criteria Congress specified in CWA § 402(b). In those circumstances, § 402(b) commands that EPA "shall approve" a State's application to administer its own NPDES program. 33 U.S.C. 1342(b). The opinion below reads ESA § 7(a)(2) to negate that legislative directive. The Ninth Circuit's view is not persuasive.

1. ESA § 7(a)(2) concerns solely the effects of an "action authorized, funded, or carried out by" a federal agency. 16 U.S.C. 1536(a)(2). Biological opinions prepared in some consultations address "how the agency action *affects* the species or its critical habitat." *Id.* § 1536(b)(3) (emphasis added); *see* 50 C.F.R. 402.14. Thus, one way to look at the interpretive issue is: what "[e]ffects" are caused by "action authorized, funded, or carried out" by EPA when EPA approves a State NPDES permitting program pursuant to CWA § 402(b)? The court below failed to properly analyze the relevant *action* "authorized, funded, or carried out" by EPA and the *effects* "proximately caused" by that action.

a. EPA "shall approve" a qualified State NPDES permitting program. 33 U.S.C. 1342(b). After EPA approval of the program, the State (and not EPA)[3] may – or may not – issue NPDES permits for pollutant discharges within the State's borders. *See id.* § 1342(b)-(c); *see also* § 1319(a)(1)-(3). EPA has little discretionary control over this approval, which amounts to a certification that the State's program meets a specific list of statutory requirements. *Id.* § 1342(b). Nor can EPA, after approval, either require or prohibit the issuance of permits by the State, provided such permits meet all applicable CWA guidelines and requirements. *Id.* § 1342(c), (d).

The relevant "action" that EPA "carries out" under CWA § 402(b) is the "approval" of the State program, but that action "authorizes" no polluting activity or impacts to listed species. Future pollutant discharges – which may or may not be authorized pursuant to *State-issued* NPDES permits – are not "authorized, funded, or carried out" by EPA in any rational sense of those words. Therefore, they cannot be the relevant "action" under ESA § 7.[4] Moreover, while EPA's CWA § 402(b) approval is a necessary *prerequisite* to a State's implementation of its own NPDES permitting program, EPA cannot be said to "authorize" the State's future permit issuance where that power is conferred

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[3] EPA's permitting authority is automatically suspended 90 days after submittal of a proposed State program. 33 U.S.C. 1342(c).

[4] *Accord Marbled Murrelet v. Babbitt*, 111 F.3d 1447, 1450 (9th Cir. 1997) (where a State, not federal, agency "has the discretion to influence the private action," there is no federal "'agency action' under § 7 of ESA"). EPA's "action" under CWA § 402(b) is complete when the transfer occurs. Hence, there is no continuing federal action under CWA § 402(b) that is subject to ESA § 7(a)(2). *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004).

directly by Congress in the CWA itself and is implemented pursuant to independent State law. *See* 33 U.S.C. 1342(b)-(c). Thus, even to the extent that State permit issuance is "authorized" (i.e., made lawful) under CWA § 402(b), it is not "authorized" by EPA and, therefore, is not the relevant EPA "action" for ESA § 7 purposes.

b. Causation concepts under the National Environmental Policy Act, 42 U.S.C. 4332 ("NEPA") and the ESA are nearly identical for two reasons. First, NEPA and ESA rules only make the federal agency responsible for the direct or indirect effects "caused by the action." 40 C.F.R. 1508.8; 50 C.F.R. 402.02 (definition of "effects of the action"); *see id.* § 402.14(g) and (h)). Second, this Court has limited NEPA and ESA "causes" to "proximate causes." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767-79 (2004); *Sweet Home*, 515 U.S. at 697 n.9 & 700 n.13. "Proximate cause" means the "direct cause . . .; producing cause; [or] primary cause" and refers to the "cause that directly produces an event." BLACK'S LAW DICTIONARY "Cause" 234 (8th ed. 2004).

In *Public Citizen*, this Court distinguished the impacts caused by *agency* action (which must be analyzed in a NEPA document) from the *impacts proximately caused by other branches of government* (there, the President and Congress, and, here, the Congress). *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004). The Court found that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." 541 U.S. at 767. Instead, the Court returned to the "familiar doctrine of proximate cause from tort law" to "draw a manageable line between the causal changes that may make an actor responsible for an effect and those that do not." *Id.*

According to the Court, the "legally relevant cause of entry of the Mexican trucks [into the U.S., possibly resulting in greater air pollution] is *not* [the agency's] action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority by limiting [the agency's] discretion." 541 U.S. at 769. "Since [the Federal Motor Carrier Safety Administration] has no ability to categorically prevent the cross-border operations of Mexican motor carriers," the agency "simply lacks the power to act on whatever information might be contained in the EIS" on air pollution impacts and cannot be forced to consider in depth the "environmental impact of an action it could not refuse to perform." 541 U.S. at 768-69.

Similarly, this Court has limited ESA "causes" by "ordinary requirements of proximate causation," emphasizing that "proximate cause" is narrower than "but for" causation.[5] Hence, *Public Citizen* and *Sweet Home* strongly support that EPA's NPDES program approval is not the legally relevant cause of the effects on listed species that may follow after subsequent State issuance of an NPDES permit, because EPA lacks responsibility for the effects of "action it could not refuse to perform." 541 U.S. at 768-69. *See also id.* at 767 ("proximate cause analysis turns on policy considerations and considerations of the 'legal responsibility' of actors"). Judge Kozinski's analysis, in

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[5] *Sweet Home*, 515 U.S. at 697 n.9 & 700 n.13; *see id.* at 708-15 (O'Connor, J., concurring). *Sweet Home* narrowly construed FWS's rule on the "harm" form of an ESA § 9 wildlife "take" (*e.g.*, the limit to "proximate cause") and sustained the rule under that construction. Surprisingly, the Ninth Circuit did not mention *Sweet Home* and reasoned that a "'but-for' causal chain" is the "obvious cause analysis." *Defenders*, 420 F.3d at 961-62 (Fed. App. 27a-28a). The Ninth Circuit does not seem to have accepted this Court's teachings that but-for causation is insufficient in many settings.

dissent, is persuasive that the "holding in *Public Citizen* applies equally to this case: Because EPA had no discretion under the CWA to decline to transfer NPDES permitting authority to Arizona, it did not need to consider the transfer's potential effects on endangered species."[6]

c. Further, EPA cannot be the legal cause of *non-water quality impacts* to listed species that might be associated with some private land use activities that also require a State-granted NPDES permit. The CWA only provides jurisdiction over water quality issues within waters of the United States. Hence, both EPA and States lack CWA authority to control impacts to listed species that do not involve water pollution.[7] "[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Public Citizen,* 541 U.S. at 770. Accordingly, the agencies correctly found that, when EPA approves a State program under CWA § 402(b), the potential non-water quality impacts of future

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[6] *Defenders*, 450 F.3d at 399 (Fed. App. 77a). Even an attorney sympathetic to Respondents' views has stated *Public Citizen* "suggests the opposite outcome from the one reached by the *Defenders* majority. If the agency lacked authority under the CWA to deny a transfer application, then its decision would not be the 'cause' of any harm that resulted. The [*Defenders*] court did not explain this apparent contradiction." Jan Hasselman, *Holes in the Endangered Species Act Safety Net: The Role of Agency "Discretion" in Section 7 Consultation*, 25 STAN. ENVTL. L. J. 125, 193 and n.309 (2006).

[7] *See Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116-17 (9th Cir. 2000); *Natural Res. Def. Council v. U.S. Envtl. Prot. Agency*, 859 F.2d 156, 169-71 (D.C. Cir. 1988); *Save the Bay, Inc. v. U.S. Army Corps of Eng'rs*, 610 F.2d 322, 326-37 (5th Cir. 1980).

permitted activities do not trigger ESA § 7 duties. *See* NAHB App. 114.

EPA's approval of a State program as directed by CWA § 402(b) also is not the proximate cause of any adverse *water quality impacts* to listed species that may result from permitted activities. Any such impacts are directly produced or proximately caused by private decisions to utilize land and other resources in a given way. Further, only the *discharge* associated with those private activities is subject to CWA regulation, and the permit issuer is the State under State law – not EPA. EPA's remoteness from, and inability to control in its CWA § 402(b) approval, impacts to listed species mean that EPA is not a legal cause of those impacts. *See* NAHB App. 113-15 (analysis in FWS's biological opinion); Fed. App. 95a-110a (EPA's and FWS's subsequent clarification).

In sum, EPA is not a "proximate cause" of any impacts to listed species that may be caused by private development that is supported by a State-issued NPDES permit. If any federal action constitutes a "proximate cause" of those potential impacts, it can only be the *action of Congress*. Congress: (1) established in the CWA a strong policy in favor of State administration (33 U.S.C. 1251(b)); (2) directed in CWA § 402(b) that EPA "shall approve" State programs under specified conditions; and (3) limited ESA § 7(a)(2) to the "[e]ffects" of actions "authorized, funded, or carried out" by a "Federal agency" (16 U.S.C. 1536(a)(2), 1536(b)(3)), and did not include the effects of State actions.[8]

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[8] FWS so interpreted the statutes in its contemporaneous biological opinion, as did EPA in the "elevation" document. NAHB Pet. App. 113-15, 563-65; *see Defenders*, 420 F.3d at 953-54, 960-61 (Fed. App. 9a-11a, 25a-27a). EPA and the Services subsequently reaffirmed that interpretation in documents considered at high agency levels. *See* Fed. App. 93a-116a.

d. Because any causation discussion by this Court could have implications in other ESA contexts, a few general principles bear mention.

In important senses, while agencies partially regulate private land use and other activities, at least with respect to being a "cause" of "take" within the meaning of ESA § 9(a)(1) and (g), 16 U.S.C. 1538(a)(1) and (g), regulatory agencies are not proximate causes of the impacts of private land uses.[9] Under the Fifth Amendment, a landowner may make any non-noxious use of private lands. Hence, regulatory exercises of the police power constrain, but are not necessary to "authorize," private land uses.[10] For similar reasons, State-regulated private action is not "State action" for Fourteenth Amendment purposes.[11] Additionally, a

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[9] Jonathan Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 429 (2005); James Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 ENVTL. L. 595, 625-26 (2003).

[10] *E.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022-30 (1992); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-17 (1922) ("Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed.").

[11] The "State action" question encompasses a causation aspect: "whether the allegedly [unlawful] conduct is fairly attributable to the State." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). "Action taken by private entities with the mere approval or acquiescence of the State is not state action." 526 U.S. at 52. "[W]here the commission has not put its own weight on the side of the proposed practice by ordering it," a regulated utility's practice is not State action caused by a State. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974).

sovereign's decision to not regulate more strictly "cannot be the threshold for legal or proximate cause."[12]

e. EPA does have oversight roles over State NPDES permit issuance and program administration under 33 U.S.C. 1342(c) and (d). EPA may – or may not – object to State-issued permits for a variety of reasons related to compliance with CWA requirements. Under both the ESA and NEPA, claims of unlawful agency inaction fail without some "*discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 61-65; *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1107 (9th Cir. 2006) (an agency's "failure to exercise discretion . . . is [not] an 'agency action' for purposes of section 7(a)(2), so as to require consultation"). More generally, partial federal funding and oversight of a State program often do not federalize State

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[12] "If it were, the United States would be a 'cause' of contamination in every CERCLA action because the federal government always could have enacted legislation regulating industrial activity." *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1275 (E.D. Cal. 1997). In an analogous area, commentators reject the theory that inadequate regulation makes a State regulator a culpable cause of "take." They do so on grounds of causation, the ESA's text, and under cooperative federalism principles under the ESA and Tenth Amendment. *See* Adler, 90 IOWA L. REV. 429-30; Rasband, 33 ENVTL. L. at 623-28; Valerie Brader, *Shell Games: Vicarious Liability of State and Local Governments for Insufficiently Protective Regulations Under the ESA*, 45 NAT. RES. J. 103 (2005); J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, 16 NAT. RES. & ENV'T 70 (ABA Fall 2001); Shannon Petersen, *Endangered Species in the Urban Jungle: How the ESA Will Reshape American Cities*, 19 STAN. ENVTL. L. J. 423, 438-54 (2000). While a comparison of the language of ESA § 7(a)(2) with that of § 9(a)(1) and (g) may produce slightly different analyses on proximate causation, we wish to make the Court aware of the ESA § 9 issues regarding who is a legally culpable "cause" of "take."

actions. *Forsham v. Harris*, 445 U.S. 169, 178-80 (1980); *United States v. Orleans*, 425 U.S. 807, 816-18 (1976). Hence, EPA's oversight should not transform a State-granted NPDES permit into federal "agency action" within the meaning of ESA § 7(a)(2).

2. The history of ESA § 7 confirms the federal agencies can permissibly construe § 7(a)(2) as operating within the boundaries of an agency's authority under its organic laws. ESA § 2(c)(1) states the "policy of Congress that all Federal departments and agencies shall . . . utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. 1531(c)(1). The "utilize their authorities" language strongly supports the view that ESA § 7 *supplements* where an agency's organic laws allow consideration of wildlife matters, but *does not supplant* limitations and directives in those organic authorities.[13]

Indeed, that was the clear intent of ESA § 7 as enacted in 1973. ESA § 7 then consisted of two sentences and no subsections. The second sentence provided: "Federal departments and agencies shall, in consultation with . . . the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out ["conservation"] programs . . . and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not

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[13] The "utilize their authorities" phrasing in ESA § 2(c)(1) and § 7 is similar to the phrase that NEPA applies "to the fullest extent possible." 42 U.S.C. 4332. Thus, there is a close analogy between NEPA and the ESA. This Court has construed the NEPA phrase to mean, "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976) (because the Disclosure Act compels federal approval within 30 days, no EIS is required under NEPA).

jeopardize the continued existence of" listed species or adversely modify critical habitat. 87 Stat. 884, 892 (1973). The House manager described that § 7 of the Conference bill "substantially amplifie[s] the obligation of [federal agencies] to *take steps within their power* to carry out the purposes of this act."[14] Thus, as originally adopted, what eventually became ESA § 7(a)(2) only required that federal agencies "utilize their authorities" to "insure" against extinction of listed species, where the agency's organic laws provided relevant discretion.[15]

It is true that the 1973 ESA removed qualifiers from predecessor statutes and from bills to the effect that agencies should preserve listed species only "insofar as is practicable and consistent with the[ir] primary purposes." *TVA v. Hill*, 437 U.S. at 181-82. In that sense, the ESA gives "endangered species priority over the 'primary missions' of federal agencies." 437 U.S. at 185. But this can be

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[14] 119 Cong. Rec. 42,913 (Dec. 20. 1973) (remarks of Rep. Dingell) (emphasis added), quoted in relevant part in *TVA v. Hill*, 437 U.S. at 184-85. Rep. Dingell cited as an example that, "[u]nder existing law, the Secretary of Defense has some *discretion*" on whether to conduct "bombing activities" in "whooping crane" habitat so, under the ESA, the "Secretary of Defense would be required to take the proper steps." *Id.* (emphasis added). In Rep. Dingell's other cited example (concerning grizzly bears), the National Park Service and Forest Service also had discretion to protect wildlife values. *See id.*; 16 U.S.C. 1, 528.

[15] The Conference Report adopted the provisions in §§ 2(c) and 7 of H.R. 37 that federal agencies shall "utilize their authorities." As that phrasing is not contained in the Senate-passed version of § 7, the Senate debates do not address § 7 as enacted. Still, § 2(b)(4) of S. 1983 stated the purposes of the Act included to "insure that all [federal] departments . . . seek, *within the scope of their authority* and administrative jurisdiction, to protect endangered and threatened species." 119 Cong. Rec. 25,694 (July 24, 1973) (emphasis added).

comfortably read as merely meaning that, where a federal agency's primary statutory duty also allows consideration of wildlife matters, ESA § 7 gives priority to avoiding the extinction of listed species.

That is a different question from the one presented here: where a statute *precludes* action based on wildlife concerns, does ESA § 7 negate that statutory limit? The answer to the presented question is "no" under the better reading of the 1973 ESA. The holding and essential logic of *TVA v. Hill* do not dictate otherwise. *See* pages 20-23, below.

After *TVA v. Hill*, through ESA amendments enacted in 1978 and 1979, Congress broke apart the long second sentence in § 7, forming what is now § 7(a)(1) and § 7(a)(2). The "utilize their authorities" language followed its closer antecedent into the "conservation" provision in 16 U.S.C. 1536(a)(1). We assume that Petitioners will again show that the absence of "utilize their authorities" in current § 7(a)(2) does *not* reflect a legislative intent to *expand* the scope of that provision. *See* Fed. Pet. at 14-17.

An intent to expand the stringency of § 7(a)(2) should not be read into the 1978 and 1979 amendments for at least three reasons. First, the amendments maintained the "policy of Congress" that federal agencies "utilize their authorities in furtherance" of ESA purposes. 16 U.S.C. 1531(c)(1).

Second, the 1979 ESA amendments *reduced* the § 7(a)(2) compliance standard. Hence, it would be illogical to infer an intent to increase the stringency or breadth of § 7(a)(2). The 1979 amendments moved § 7 from prohibiting a federal action unless the action agency could "insure" that the proposed action "do[es] not jeopardize the continued existence of a" listed species (87 Stat. 892 (1973)) to allowing an agency action to proceed if it is "not likely to

jeopardize" (16 U.S.C. 1536(a)(2)). The legislative intent was to allow more agency actions to pass muster under § 7.[16]

Third, some elements of the ESA exemption procedures added by the 1978 amendments would not make sense if § 7(a)(2) barred an action that is compelled by another statute. *E.g.*, 16 U.S.C. 1536(e)(3)(A)(i) (consideration of alternatives that are within an agency's range of authority, but would not violate § 7(a)(2)); *see* Fed. Pet. Reply at 5-6 n.1. Hence, the 1978 legislative intent can reasonably be

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[16] After *TVA v. Hill* described the potency of the enacted ESA, the 1979 Congress became concerned that ESA § 7 could be read as prohibiting federal actions unless the federal agency could insure there was no possibility of jeopardy. As Rep. Breaux stated in describing his adopted floor amendment:

> No matter how many precautions are taken, there may be a small chance that the agencies' action will end up jeopardizing the species. No agency can or should be expected to give a 100-percent guarantee of no adverse impact. I am concerned that the language of the existing statute ["insure . . . do not jeopardize"] could be interpreted to require this guarantee. The language I have proposed . . . allows Federal agencies to consider the probability or likelihood of jeopardizing a listed species in deciding whether to go ahead with a particular action.

125 Cong. Rec. 29,437 (Oct. 24, 1979).

The Conference Report noted the "not likely to jeopardize" phrasing "continues to give the benefit of the doubt to the species, and would continue to place the burden on the action agency to demonstrate . . . that its action will not violate Section 7(a)(2)." H.R. Conf. Rep. No. 96-697 at 12, 1979 U.S.C.C.A.N. 2572, 2576. Still, the ESA § 7(a)(2) "benefit of the doubt" was narrowed. It does not resolve all small risks of jeopardy in favor of listed species, but only risks near 50%. Only then could a federal agency not make a "not likely to jeopardize" finding. There should not be "negative biological opinions [finding jeopardy] whenever the action agency cannot guarantee with certainty that the agency action will not jeopardize" the species. *Id.* Thus, Congress moved in the direction that less certainty is required to comply with ESA § 7(a)(2).

read as providing, in the Endangered Species Committee provisions, *another* exemption from ESA § 7. The 1978 amendments do not undercut Petitioners' position that, from the beginning, ESA § 7(a)(2) also exempted actions where the federal agency lacked discretion under its organic laws to act on the basis of wildlife concerns.

3. The court below, in parsing ESA § 7(a)(2), gave unwarranted weight to the word "insure." The panel majority rationalized that to "insure" is to "make certain" and, unless § 7(a)(2) is read to supply "authority to take measures necessary to prevent harm to endangered species, it is impossible for that agency to 'make certain' that its actions are not likely to jeopardize those species." *Defenders*, 420 F.3d at 963-64 (Fed. App. 31a-32a).

That rationale has an *ipse dixit* quality. Further, it plucks one word from its ESA § 7 context – ignoring other pertinent provisions, like "utilize their authorities" (discussed above) – and imposes an unusual meaning on "insure."

The dictionary meaning of "insure" is to "make certain." Thus, "insure" concerns the *level of certainty* for substantive compliance with § 7(a)(2), not whether § 7(a)(2) overrides limitations Congress stated in other laws. The 1979 Congress used "insure" in precisely this sense, when it reduced the level of certainty for § 7(a)(2) compliance.[17]

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[17] *See* note 16, and accompanying text. In particular, Rep. Breaux stated the "act currently requires Federal agencies to insure that any action does not jeopardize listed species." 125 Cong. Rec. 29,437 (Oct. 24, 1979). His amendment alters the certainty suggested by "insure" so that federal agencies are "to insure that their actions are 'not likely' to jeopardize" listed species" as "[n]o agency can . . . give a 100 percent guarantee." *Id.*

4. This Court's precedents call for deference to the implementing agencies' interpretation of ESA § 7 and to FWS's interpretation of its regulations.

ESA § 7 rules provide that "Section 7 and the requirements of this part apply" only to "actions in which there is *discretionary* Federal involvement or control," and consultation might be reinitiated only "where *discretionary* federal involvement or control has been retained or is *authorized by law*." 50 C.F.R. 402.03, 402.16 (emphasis added). The most natural reading of these provisions is that § 7(a)(2) applies only when an agency has discretion under its organic laws to modify its action due to wildlife effects.

The panel majority, however, improperly construed § 402.03 to add nothing.[18] After relying on "insure" and other rationales to conclude that ESA § 7(a)(2) can *only* be interpreted to establish an overriding authority and obligation paramount to any contrary statutory mandate, the panel then construed § 402.03 to be merely "coterminous with the statutory phrase . . . actions 'authorized, funded, or carried out' by a federal agency. *Defenders*, 420 F.3d at 967-69 (Fed. App. 39a-43a). The panel's construction of the rule thus allowed it to avoid addressing the conflict between the Service's interpretation of the statute (as embodied in the rule) and the court's own interpretation – and to avoid giving deference to the Service's entirely permissible view.

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[18] *See* Sherry Bosse, *Defenders of Wildlife v. EPA: Testing the Boundaries of Federal Agency Power Under the ESA*, 35 ENVTL. L. 1025, 1042-47 (2006). In Judge Kozinski's well-crafted words, "[u]nable to reconcile this regulation with its newly expansive interpretation of the ESA's mandate, the majority simply finds that the word 'discretionary' in the regulation is meaningless." *Defenders*, 450 F.3d at 398 (Fed. App. 75a).

FWS has now definitively articulated its interpretation of § 402.03 to mean that "Section 7 does not require agencies to act on grounds of species protection where the agency, . . . because of statutory limitations . . ., lacks legal discretion to do so." Fed. App. 110a. In this Court, FWS's interpretation of its own rule should be "controlling" as it is not "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

The statutory interpretation codified at 50 C.F.R. 402.03 and 402.16 deserved a less strained reading and at least some deference from the Ninth Circuit. It now warrants *Chevron* deference, as all the agencies implementing § 7(a)(2) have joined in that interpretation.[19]

The intended reach of ESA § 7(a)(2) is ambiguous in light of the "utilize their authorities" language, the absence of legal causation where agency discretion is lacking, and

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[19] The Services' construction of ESA § 7 in the 50 Part 402 rules, in isolation, might not warrant deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984). An agency must have delegated statutory authority before it can issue binding legal rules. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990). The four Justices reaching the issue and the Solicitor General have concluded that the Services' "consultation" or "assistance" role under 16 U.S.C. 1536(a)(2) does not provide authority to issue ESA § 7 rules binding on the action agencies who seem to have the lead responsibility under ESA § 7's text. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-70 (1992).

Here, all the agencies that collectively implement ESA § 7(a)(2) have joined in the common interpretation that § 7(a)(2) does not apply and "does not expand EPA's authority to address the concerns of listed species where Congress has limited the Agency's ability to consider such concerns." Fed. App. 96a (EPA letter); *see, e.g.*, Fed. App. 108a (FWS response). That formal, uniform interpretation by all implementing agencies warrants deference under *Chevron*. *United States v. Mead Corp.*, 533 U.S. 218, 227-34 (2001).

other aspects of the statutory framework and history discussed above[20] The federal agencies can and have resolved that ambiguity in their interpretation of § 7(a)(2) and its implementing rules. Therefore, a conclusion that "the [agencies'] interpretation is reasonable suffice[s] to decide this case." *Sweet Home*, 515 U.S. at 703.

5. Another crucial rationale in the opinion below is that *TVA v. Hill*, 437 U.S. 153 (1978), "confirms th[e] textual interpretation" that ESA § 7(a)(2) supplies the agency "authority [and duty] to take measures necessary to prevent harm to endangered species." *Defenders*, 420 F.3d at 964 (Fed. App. 32a). Yet, that was *not* a holding in *TVA v. Hill*. While some *dicta* in *TVA v. Hill* arguably support the result below, other *dicta* and the lack of a pertinent holding leave ample room for the agencies' reasonable ESA construction.

TVA v. Hill did not express any holding interpreting § 7 because a violation of § 7 was conceded. 437 U.S. at 171-73. The questions before the Court were whether: (1) the legislative history of appropriations acts overrode § 7; and (2) courts could decline to grant an injunction where a future federal action (closing the Tellico Dam gates) was expected to directly cause the extinction of the snail darter. 437 U.S. at 156, 171-73, 184-95.[21]

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[20] "Nowhere in the legislative history of the ESA and its amendments is there any explicit discussion of the operation of § 7 on 'nondiscretionary' agency actions." Hasselman, 25 STAN. ENVTL. L. J. at 133.

[21] *TVA v. Hill* was an unusual case in many ways. It was briefed early in a new Administration under shifting signals. The government's brief provided TVA's position on the ESA in the main body, and FWS's opposite position in an appendix. *See* Rex E. Lee, *Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1, 27-28 (2003). *TVA v. Hill* was authored by

(continued....)

The Court answered "no" to both questions. Different questions are presented here. For example, "the Supreme Court never specifically addressed the question of whether TVA had the 'discretion' to not finish the dam. Nor did such an argument play a prominent role in the briefing before the court." Hasselman, 25 STAN. ENVTL. L. J. at 137 n.4.

Further, *TVA v. Hill* concluded that the *legislative history* of an appropriations act cannot override a substantive statute like ESA § 7. 437 U.S. at 189-93. *TVA v. Hill* did not address the issue here of what happens when substantive statute (like CWA § 402(b)) mandates specific action regardless of potential wildlife impacts. "*TVA*, which did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out purposes of the ESA, is hardly authority to the contrary." *Platte River Whooping Crane Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27, 33-34 (D.C. Cir. 1992).

Significantly, TVA was "carrying out" a *federal* dam project that would directly impact a listed species. 437 U.S. at 173-74 and n.18, 186-87 and n.32. The result may well be different here, where the only action "carried out" by EPA is the "approval" – more in the nature of a certification – of Arizona's NPDES program as compliant with CWA

(continued) . . .
Chief Justice Burger, who "initially voted in dissent," then "assigned himself the opinion for the Court, after it became clear that a majority of the justices were for affirming the Sixth Circuit." Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 ECOLOGY L.Q. 363, 416 (2006). The "undercurrent of skepticism places the Court's opinion much closer to the two dissenting opinions than might first appear." *Id.* Finally, at least one noted legal scholar has criticized the mode of legal analysis in *TVA v. Hill*. Ronald Dworkin, *Law's Empire* 20-23, 313-47 (1986).

§ 402(b) criteria. The later actions that may affect listed species would be private actions and State regulatory actions, not the federal actions to which ESA § 7(a)(2) applies.

More generally, much of *TVA v. Hill* is lengthy *dicta* and ESA background. It is "contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was not presented." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 n.5 (1992); *see United States v. Booker*, 543 U.S. 220, 239-41 (2005) (prior decisions regarding the Sentencing Guidelines did not establish precedent on issues "not [earlier] presented"). Hence, *TVA v. Hill* does not resolve this case.

Notably, some *dicta* in *TVA v. Hill* support Petitioners' view that ESA § 7 applies only within the limits of an agency's legal power:

> [T]he House manager of the bill, Representative Dingell, provided an interpretation of the Conference bill . . . "[Section 7] substantially amplifie[s] the obligation of [federal agencies] to *take steps within their power* to carry out the purposes of this act."

437 U.S. at 182-84 (emphasis added). The snippets cited in the opinion below do not dictate the opposite conclusion.[22]

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[22] The panel rationalized that, when this Court stated ESA § 7's "very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded or carried out* by them do not *jeopardize*'" (437 U.S. at 173), the "affirmative command" must override other laws. *Defenders*, 420 F.3d at 964 (Fed. App. 32a-33a). This Court's observation that "insure . . . do not jeopardize" is an "affirmative command" does not resolve the distinct issue here of whether that command overrides contrary statutory directives.

The panel also cited from 437 U.S. at 184, 193-94 that the "plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the cost." *Defenders*, 420

(continued....)

It also is highly significant that *TVA v. Hill* was decided before the Services had adopted the regulations that ESA § 7 applies only to "discretionary" actions, and before *Chevron* and its progeny required greater judicial deference to agency interpretations of statutes and rules. As ESA § 7 allows the agencies' current interpretation, the agencies might even overrule an earlier judicial opinion favoring a different interpretation. *Brand X*, 545 U.S. at 980-86. Even if there have been inconsistent agency interpretations of ESA § 7(a)(2) in the past, courts defer to the current interpretation where it reflects the agency's considered judgment. *Brand X*, 545 U.S. at 980-82.

The Ninth Circuit erred in finding that *TVA v. Hill* allows only one construction of the ESA. Thus, a conclusion that "the Secretary's interpretation is reasonable suffice[s] to decide this case." *Sweet Home*, 515 U.S. at 703.[23]

(continued) . . .
F.3d at 964 (Fed. App. 33a). But the emphasis was on "whatever the cost" to rebut "TVA's claim that the Act was not intended to stop" a project that "was near completion" (437 U.S. at 184) and to rebut TVA's view that courts should have equitable discretion to decline an injunction where the federal agency's own future action would cause the extinction of a listed species (*id.* at 171-74, 193-95).

Further, the court below also relied on the "primary purpose" and "first priority" legislative history cited in *TVA v. Hill*. *Defenders*, 420 F.3d at 964-65 (Fed. App. 34a). That is distinguished at pages 14-15, above. And again, this Court did not address any argument that TVA lacked discretion to not close the dam gates. *Dicta* in *TVA v. Hill* on distinguishable issues should not be controlling on the scope of ESA § 7(a)(2) presented and briefed in the current appeals.

[23] *Sweet Home* sustained FWS's regulatory view of "harm," even though it seemed to be inconsistent with the ESA views of "[b]oth the Senate and House floor managers of the bill." 515 U.S. at 727-28 (Scalia, J., dissenting).

6. The agencies' construction of ESA § 7(a)(2) as not overriding limits on an agency's legal authority accords with many lower court decisions. As the D.C. Circuit stated, the ESA "does not *expand* the powers conferred on an agency by its enabling act." *Platte River*, 962 F.2d at 33-34.[24]

The decision below directly conflicts with *Am. Forest & Paper Ass'n v. U.S. Envtl. Prot. Agency*, 137 F.3d 291 (5th Cir. 1998). There, the Fifth Circuit concluded that EPA could not attach endangered species conditions to a CWA § 402(b) transfer to Louisiana as EPA "'shall approve' proposed state permitting programs that meet nine specified requirements." 137 F.3d at 297. "[N]othing in the ESA grants the agency the authority" to add to or countermand the direction in CWA § 402(b), as "Section 7 of the ESA . . . confers no substantive powers." 137 F.3d at 298. Section 7 is not a "font of new authority" but directs "agencies to channel their *existing* authority in a particular direction." 137 F.3d at 299.

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[24] The ESA "does not, by its terms, enlarge the jurisdiction of the Corps of Engineers under the Clean Water Act." *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985). This 1985 decision may be one reason why the 1986-adopted 50 C.F.R. 402.03 and 402.16 state that ESA § 7 is limited to "discretionary" federal actions within an agency's "authority." *See* James Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look from a Litigator's Perspective*, 21 ENVTL. L. 499, 529 (1991). The concept that ESA § 7 does not apply where the federal agency had no discretion to consider wildlife impacts also underlies *Strahan v. Linnon*, 967 F. Supp. 581, 607-08 (D. Mass. 1997), *aff'd*, 1998 WL 1085817 at *3 (1st Cir. 1998) ("pursuant to 50 C.F.R. § 402.03, the requirements of § 7 do not apply to the Coast Guard's documentation and inspection duties" because "the Coast Guard is required to issue Certificates of Documentation and Inspection if certain statutory criteria are met, none of which reference environmental concerns").

The Ninth Circuit as well had read § 7(a)(2) not to be an overriding constraint on every federal agency action in many decisions prior to *Defenders*.[25] *Defenders* cannot be fully reconciled with earlier Ninth Circuit precedents. *Accord* Judge Thompson's dissent at 420 F.3d 979-81 (Fed. App. 64a-66a); Judge Kozinski's dissent at 450 F.3d 398 (Fed. App. 75a); Bosse, 35 ENVTL. L. at 1042-47.

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[25] *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995), for example, involved a pre-ESA agreement to provide for future construction of reciprocal rights-of-way across intermingled federal and private lands. Under that contract, the federal agency's review of the proposed road was "limited to three factors unrelated to the conservation of the threatened spotted owl." 65 F.3d at 1508. "In light of the statute's plain language," the panel's view that the "regulations supply the answer" by referring to "discretionary" federal control, and "deferring" to the agency's interpretation, the panel concluded that ESA § 7(a)(2) does not apply "where, as here, the federal agency lacks the [wildlife-related] discretion to influence the private action." 65 F.3d at 1509.

Limited discretion in a post-ESA contract defeated claims of broad ESA § 7(a)(2) duties in *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001). The panel held:

> Because the FWS has not retained discretionary control over Simpson's incidental take permit [regarding spotted owls] that would inure to the benefit of the marbled murrelet or the coho salmon [two subsequently listed species], the FWS is not required to reinitiate consultation to consider the permit's effects on those species.

255 F.3d at 1083. To the same effect are *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1110 (9th Cir. 2006), and *Ground Zero for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (ESA § 7 did not apply "because the Navy lacks the discretion to cease Trident II operations . . . for the protection of threatened species"). Thus, *Defenders* is contrary to considerable Ninth Circuit precedent that ESA § 7(a)(2) and 50 C.F.R. 402.03 and 402.16 do not create overriding constraints applicable to even non-discretionary agency action.

Moreover, the panel's attempt to reconcile its opinion with these precedents is unpersuasive. Under the Ninth Circuit decisions discussed in note 25, a federal agency and private party have the statutory authority to essentially contract away the application of ESA § 7(a)(2) to future federal agency actions. Congress should have at least an equal ability to prevent the application of § 7(a)(2) to particular actions by enacting laws that, like the contracts in those cases, preclude consideration of wildlife factors.

7. A particularly pernicious effect of transforming ESA § 7 into a super-statute is that it thwarts the will of Congress as expressed in other statutes. In many statutes, Congress has directed a federal agency to do X (*e.g.*, issue a permit, provide insurance or a grant) if particular conditions are satisfied. Thus, interpreting ESA § 7(a)(2) to create an overriding duty and authority *despite* such directives would seriously impair the ability of federal agencies to issue (let alone issue promptly) any number of permits, loans, insurance, or other government services under the standards specified in their organic laws. The panel's view that ESA § 7(a)(2) adds a procedural consultation prerequisite, and even may prohibit otherwise mandatory federal action, frustrates the legislative objectives of the other statutes.

Yet, a "cardinal principle of statutory construction is that repeals by implication are not favored" and that "wherever possible, statutes should be read consistently." *Kremer v. Chem. Constr. Co.*, 456 U.S. 461, 468 (1982). The "utilize their authorities" language in ESA §§ 2(c) and 7 and the supporting legislative history show there was no "clear and manifest" (*Watt v. Alaska*, 451 U.S. 259, 267 (1981)) intent to repeal the directives of other statutes. *See* pages 13-17 above.

Instead, the ESA and CWA should be read consistently, as they are under Federal Petitioner's view. That is, § 7(a)(2) does not apply when another statute – here, CWA § 402(b) – directs agency action without consideration of wildlife impacts. But ESA § 7(a)(2) applies, and ordinarily is controlling, where the agency is taking action on which its organic laws or contractual commitments leave room for consideration of the particular wildlife issue. Thus, Federal Petitioner's position avoids repeals by implication. In contrast, under the view in the opinion below, ESA § 7(a)(2) repeals by implication the directives in many statutes.

Kremer found that Title VII of the 1964 Civil Rights Act, and subsequent amendments, were not sufficiently clear to repeal 28 U.S.C. 1738's respect for State judgments. 456 U.S. at 468-76. This case presents similar factors. A significant statute and its amendments (here, the ESA and the 1978 and 1979 amendments) should not be read to negate the CWA's express language and important legislative policies on cooperative federalism.

8. The CWA has a federalism objective that States take the lead in regulating the water quality impacts of private land uses.[26] The ESA, as well, has strong provisions on cooperative federalism and respect for State prerogatives.[27] The strong pro-State policies in both the

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[26] 33 U.S.C. 1251(b); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166, 172-74 (2001).

[27] *See* 16 U.S.C. 1531(a)(5) ("encouraging the States . . . through Federal financial assistance and other incentives, to develop and maintain conservation programs"); 1531(c)(2) ("policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species"); 1533(d) and 1535(g)(2) (State law on "take" can sometimes be controlling), 1535(a)-(c) (federal funding of State

(continued....)

CWA and ESA are best served if ESA § 7(a)(2) does not require EPA to condition or possibly prohibit altogether the State assumption of NPDES permitting authority anticipated by CWA § 402(b).

9. The accomplishment of ESA objectives does not require that § 7(a)(2) be transformed into a vehicle to regulate private activities (such as future State-permitted NPDES discharges) that are not directly "authorized, funded, or carried out" by a federal agency.

ESA § 9(a) generally makes it unlawful for "any person" to "take" even a single member of an "endangered" wildlife species. 16 U.S.C. 1538(a)(1)(B). Rules and other ESA provisions extend the same "take" prohibition to most "threatened" wildlife.[28] The "take" of wildlife refers to the "actual death or injury of a protected animal," including wildlife deaths that indirectly result from private activities

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(continued) . . .
ESA programs in voluntary cooperative agreements). Indeed, "debates over the ESA centered on issues of federalism. Congress was concerned about how not to infringe on state and local authority." Petersen, 19 STAN. ENVTL. L. J. at 441-43.

[28] *See* 50 C.F.R. 17.31(a) (exercising the authority in 16 U.S.C. 1533(d) to make the "take" of most "threatened" wildlife unlawful); *Sweet Home*, 515 U.S. at 690-93 & n.5.

The 1982 Congress softened the absolute prohibition against "take" to allow some productive land uses to proceed despite the possibility of "incidental take." *See* 16 U.S.C. 1536(b)(4), 1539(a)(2); *Sweet Home*, 515 U.S. at 700-01, 707-08. Permitting incidental take "addresses the concerns of private landowners who are faced with having otherwise lawful actions . . . prevented by section 9." H.R. Conf. Rep. No. 97-835 at 29, 1982 U.S.C.C.A.N. 2860, 2870; *see* H.R. Rep. No. 97-567 at 15, 1982 U.S.C.C.A.N. 2807, 2815 (provisions adopted "in response to legitimate problems brought before Congress" by "private landowners").

that adversely modify habitat of listed wildlife. *Sweet Home*, 515 U.S. at 691 n.2; *see id.* at 696-03.

Sufficient protection for listed wildlife is provided by: (1) the ESA § 9 take-avoidance duty on all persons; (2) the ability to enjoin "take" through ESA § 11(g) citizen suits and federal enforcement (16 U.S.C. 1540(e)(6) and (g)); (3) the encouragement of voluntary habitat conservation plans in ESA § 10(a)(2) to resolve incidental take issues; and (4) compensatory acquisition of habitat interests under ESA § 5, 16 U.S.C. 1534. ESA § 7 should not be read broadly to inject federal agencies like EPA into what should be the ESA § 9 take-avoidance obligations of private actors who require no EPA "authorization" for their activities. *See EPIC v. Simpson*, 255 F.3d at 1082-83.

10. As has been illustrated above, the ESA often reflects a balance between competing legislative objectives. This includes balancing the objective to protect listed species against objectives to allow productive land uses, to reduce costs, and to be respectful of State autonomy. *See, e.g.*, 16 U.S.C. 1531(a)(5) and (c); 1533(b)(2), (d), and (f); 1535; 1536(a), (b)(4), and (e)-(p); 1539(a)(2) and (d). Statements to the effect that the "plain intent of Congress . . . was to halt . . . species extinction, whatever the cost" (*TVA v. Hill*, 437 U.S. at 184) do not capture the nuances of the 1973 ESA. In any case, however, such statements do not accurately reflect the compromises in the current ESA. As this Court later observed, the ESA includes "another objective" – "to avoid needless economic dislocation produced by agencies zealously but unintelligently pursuing their environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

TVA v. Hill is often invoked by lower courts to require whichever interpretation most favors listed species. So it was in the decision below. These appeals present an

opportunity for the Court to set the record straight. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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